John R. Harland Company of Puerto Rico, Inc. ***and*** **Union de Trabajadores de la Industria Gastronomica, Local 610, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.** Cases 24-CA-4489, 24-CA-4507, and 24-CA-4519

September 20, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 1, 1982, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, John R. Harland Company of Puerto Rico, Inc., Hato Rey, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard in Hato Rey, Puerto Rico, on February 10 and 11, 1982, on an initial unfair labor practice charge filed on April 24, 1981, and a consolidated complaint which issued on July 30, 1981, alleging that John R. Harland Company of Puerto Rico, Inc., herein called Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, by terminating its supervisor, Israel Torres, because he refused, as instructed, to commit unfair labor practices, and violated Section 8(a)(3) and (1) of the Act by discharging employees Rafael Garcia and Jorge Hernandez because of their union activity. In its duly filed answer, Respondent denies that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and Respondent.

Upon the entire record in this proceeding, including my opportunity directly to observe the witnesses while testifying and their demeanor, and upon consideration of the post-hearing briefs, it is hereby found as follows:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Georgia corporation with a place of business in the city of Gurabo, Puerto Rico, from which it is engaged in the printing, nonretail sale, and distribution of bank stationery and related products. During the calendar year preceding issuance of the complaint, a representative period, Respondent, in the course of said operations, purchased and caused to be transported and delivered to said facility goods and materials valued in excess of $50,000, which were transported and delivered thereto directly from points and places located outside the Commonwealth of Puerto Rico.

The complaint alleges, the answer admits, and I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Union de Trabajadores de la Industria Gastronomica, Local 610, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues and the Background*

The complaint in this proceeding challenges the legitimacy of three discharges effected during the course of an initial campaign to organize Respondent's previously unrepresented employees. It appears that in either late March or early April 1981,[1] one of the alleged discriminatees, Rafael Garcia, contacted union functionaries for the purpose of securing union representation at Respondent's plant. Soon thereafter, formal organization efforts began when Garcia, with the aid of several other employees, distributed union authorization cards, soliciting signatures thereto from among coworkers. The fully executed cards were ultimately returned to Garcia, who forwarded them to the Union.

[1] Unless otherwise indicated all dates refer to 1981.

On April 21, the Union filed an RC petition. On April 22, Israel Torres was terminated. While Torres was a supervisor and had engaged in no union activity, the General Counsel urges illegality therein, relying on testimony that the discharge was effected only after Torres had refused to adhere to instructions that he engage in statutorily proscribed conduct. See, e.g., *General Engineering, Inc. and Harvey Aluminum (Incorporated)*, 131 NLRB 648, 649-650 (1961).

The remaining allegations emerge from a more parochial setting. Thus, on April 23, the day following the termination of Torres, Respondent discharged Rafael Garcia, the central force for unionization within the work force. An unfair labor practice charge was filed in that connection on April 24. While said charge was pending, Respondent, on May 1, terminated Jorge Hernandez, an employee whose union activity appears to have been limited to the execution of an authorization card.

By way of defense, Respondent denies that Torres was directed to engage in unlawful conduct, claiming instead that he was discharged solely by virtue of his continuing unsatisfactory performance. Similarly, in respect to Garcia and Hernandez, Respondent denies that it was aware, at the time of their respective discharges, that either was a union adherent, and urges that in each case the discharge was grounded upon considerations disassociated from those protected by the Act.

B. *Concluding Findings*

1. The discharge of Israel Torres

As of April 22, Torres had been employed by Respondent for almost 9 years. He served as supervisor of the voucher department during the last 4 years of his employment.

The events furnishing the immediate foreground to this discharge are subject to a sharp conflict in testimony. It is noted, however, that Respondent conducted daily management meetings in which supervisors participate. According to Torres, the meeting held on the morning of April 22 was addressed by Assistant Plant Manager Otto Oppenheimer. The latter allegedly informed those present that he had been told in confidence that employees were attempting to organize a union within the Company,[2] while brandishing a list which identified four employees who reportedly were promoting the Union.[3] The supervisors, according to Torres, were instructed to watch out for rumors and to notify Oppenheimer if they observed employees distributing cards.

Later, at the close of work on April 22, Torres was summoned to Oppenheimer's office. Oppenheimer and Plant Manager Michael Snyder were present. According to Torres he was again shown the list containing the names of the four employees, with Mike Snyder inquiring if Torres had observed them in union activity. After Torres responded in the negative, Snyder indicated that he did not understand, inasmuch as two of those named worked under Torres' supervision, and a third, while in another department, was assigned to the same area. However, most critical to the analysis is the assertion by Torres that he was then told by Snyder to "call these employees and to accuse them of promoting or distributing cards for the Union." To this, Torres persisted that he had not observed any union activity, and denied that he ever saw anyone distributing cards or promoting the Union within the Company; Torres acknowledged that he had simply heard rumors concerning unionization in the restrooms. Oppenheimer then inquired as to whether Torres understood what Snyder had told him.[4] Torres said he thought that he did, but that, since his English was not the best, he asked for the Spanish version. Oppenheimer then explained in Spanish that Torres was to call the employees in "and accuse them of distributing cards and promoting . . . the Union." Torres asserts that at this juncture he again repeated that he had seen nothing, whereupon he was admonished that, if he failed to abide by Snyder's directive, he would be suspended for "incompetence." When Torres reiterated that he had neither seen nor heard anything, he was terminated.

Contrary to Torres, testimony of Oppenheimer and Snyder denied that union activity was mentioned during the discharge interview or that it had anything to do with the termination of Torres.[5] Instead, they claim that the subject matter addressed therein related exclusively to Torres' continuing failure to correct alleged production, quality, and disciplinary problems in his department.

Reconstruction of what transpired at the above meeting is no simple task. The evidence on both sides was less than convincing. Serious doubt was generated from the accounts of Oppenheimer and Snyder. Initially, a question emerged as to why Torres, whom Respondent acknowledged to be a good press operator,[6] was discharged rather than merely relieved of his supervisory functions.[7] Curiosity was also aroused by the timing of the Torres termination in that notwithstanding his ongoing deficiencies as a supervisor[8] credible evidence was

[2] Torres testified also that at a similar meeting, a month earlier, Oppenheimer mentioned that the employees were attempting to organize a union and for supervisors to be alert to organization activity.

[3] According to Torres, the four employees on the list were Rafael Garcia, Armado Ayala, David Perez, and Angel Lamboy.

[4] In addition, according to Torres, Oppenheimer admonished that as a part of management Torres should do as told.

[5] Both denied either reference to or the existence of a list naming employee proponents of the Union.

[6] See G.C. Exh. 7(a) in which either Oppenheimer or Assistant Manager Bill Torres described Torres as "a wonderful pressman when he operates a printing machine." Although that document was dated January 30, 1981, there is no indication that management's opinion toward Torres' ability as a pressman had changed during subsequent periods.

[7] Respondent in the past had dealt with a former supervisor, Angel Lamboy, through demotion rather than discharge.

[8] Documentary evidence confirms and I have no doubt as to Respondent's genuine concern for the performance of Torres as a supervisor. This dissatisfaction was formally brought to his attention in an evaluation given in December 1980. Furthermore, on January 30, 1981, Torres was called before management and given a formal warning concerning his performance. I also credit the testimony of Snyder and Oppenheimer that on other occasions Torres had been informal counseled as to the need for improvement in his performance, and, further, that employees within his jurisdiction had complained to higher officials concerning Torres' inadequacy.

lacking as to any specific event triggering the determination by Snyder that the time had come to cut Torres loose.[9] The sudden nature of this action and the fact that it was taken without hire or promotion of a successor[10] are not atypical of the scenario frequently encountered where discharges are effected on pretextual grounds.

Notwithstanding the suspicion aroused by the foregoing, the issue of discrimination turns critically on precisely what transpired at the time of the discharge. For the General Counsel can prevail only if it be established that Torres, as a supervisor, was terminated for refusal to participate in unlawful conduct in circumstances where one might legitimately assume that, absent intervention of statutory remedies, the organizational rights of rank-and-file employees would be impeded. On balance, the testimony of Torres fails to substantiate a *prima facie* case of discrimination. From my observation, Torres was not regarded as a witness capable of comprehending and recreating through accurate testimony precisely what was said by Oppenheimer and Snyder at the time of his discharge. His account seemed incoherent, incomplete, and an entirely too untrustworthy foundation for a finding as to the nature of the interference with employee rights, if any, that was contemplated by Snyder and Oppenheimer at the time of the discharge.[11] Accordingly, it is concluded that the evidence does not preponderate in favor of the view that the termination of Torres violated the Act and this allegation of the complaint shall be dismissed.

2. The termination of Rafael Garcia

As heretofore indicated, Rafael Garcia was the principal protagonist of the Union among Respondent's employees. It was Garcia that contacted employees at a neighboring organized plant, Universal Cigar, to enlist their aid in that connection. Following his initial direct contact with a union representative, Garcia, in early April, obtained authorization cards, which he promptly distributed to fellow employees for signature or further distribution, later collecting signed cards. His own card was dated April 21. After obtaining executed cards in sufficient quantity to support the filing of an election petition, Garcia delivered them to the Union. The Union filed its election petition on April 21.[12]

Two days after the filing of the petition, Respondent terminated Garcia. The day before, his immediate supervisor, Israel Torres, was discharged. At the time of his termination, Garcia served as a shipping clerk on the day shift in the voucher department. He had been employed for 3 years.

In this connection, the evidence discloses that the work of Garcia on the first shift required him to regularly utilize a cutting machine. Downtime was created by the fact that the Company possessed only a single cutting machine which was also utilized by litho employees and collators. For some months prior to the termination of Garcia, the Company had been considering various ways of eliminating this bottleneck. The possibility of transferring the shipping operation and Garcia to the second shift was among the options considered.[13] However, other alternatives were probed as well. The possibility of acquiring an additional cutting machine was proposed as was the possibility that Garcia would be retained on the day shift to do work other than shipping, while another employee would perform his former tasks but on the second shift.

In any event, there is little dispute that prior to April 23 the matter had been the subject of considerable dialogue between supervisory officials and Garcia. On April 22, Respondent's solution crystalized, with an additional innovation not previously discussed.

Thus, on the afternoon of April 22, Mike Snyder and Assistant Manager Bill Torres found it necessary to seek out Garcia in the latter's neighborhood to inform him of management's determination. The conversation appears to have opened with Snyder indicating that the Company had a good offer for Garcia; namely, that Garcia would start working the next day as supervisor of the voucher department on the night shift. Such a promotion had not previously been mentioned and Garcia requested time to deliberate the offer. The next morning he reported for work at his usual 6 a.m. starting time when he was called to the office by Assistant Manager Torres. Torres inquired as to Garcia's decision. Garcia requested a further explanation of the offer, when Snyder arrived. Torres reiterated: "[W]e want you to start working as a supervisor on the second shift." Garcia again requested time to think it over. Torres indicated he would have to answer "today," whereupon Garcia agreed to come to a decision by the 2:30 quitting time. Torres then indicated that this would be unsatisfactory, and that Garcia had to provide an answer "at this moment." To this, Garcia answered that he would work any shift, performing whatever tasks the Company desired, but that he would not work as a supervisor. Torres then advised Garcia that what had been offered was the only position available for him. Snyder then discharged Garcia, demanding that he "leave the building immediately." Indeed, Garcia was

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[9] Oppenheimer on questioning by me attempted to afford some explanation with respect to the coincidental timing. He indicated that, on the morning of April 22, a quality control problem developed within the department of Torres which resulted in scrap, and required that a job be redone. I was not persuaded by Oppenheimer's testimony in this respect. The reference was omitted from his initial testimony, and he failed to impress me as having a sufficient capacity for recollection to be able to isolate the incident to a specific date. Furthermore, his testimony in this respect was uncorroborated. Michael Snyder, who testified that the discharge was his decision, failed to advert to any specific condition at a time proximate to April 22 which bespoke adversely of Torres' ability.

[10] Raymond Nunez, the plant foreman, inherited, as an additional responsibility, jurisdiction over the voucher operation.

[11] Even were I to accept the testimony of Torres, it is not entirely clear that the directive imposed upon him by Respondent would have been sufficient to support an illegal discharge. See, e.g., *World Evangelism, Inc.*, 261 NLRB 609 (1982).

[12] Evidence in the record indicates that the Company was informed of the filing of the petition through a telephone call placed by a Board agent. The precise date on which this occurred is not specifically disclosed, but it was admitted by Snyder that knowledge of the petition's filing preceded receipt of a copy thereof in the mail.

[13] Garcia questioned whether this would not completely resolve the problem in that employees on the second shift also utilized the cutting machine. His view in this respect was not refuted.

escorted by Snyder from the office and until his departure from the premises.[14]

The totality of the record supports a clear inference that Garcia was terminated unlawfully. Consistent with Respondent's observation, there is no direct, unequivocal evidence that Respondent was mindful of Garcia's role in the campaign on April 22 and 23. That this was the case, however, is evident from the total circumstances.[15] Thus, although the union activity was conducted in a context of secrecy, Garcia was central to the effort to obtain signed authorization cards. Management was alerted by a female employee as to the existence of union activity and reports circulated within supervision concerning "molestation" by union supporters, a charge that surely would evoke management interest as to the identity of the employees responsible. Moreover, there is also the testimony of incumbent employee David Perez that, in a conversation in his work area 3 or 4 days after the discharge of Garcia, Bill Torres stated that Garcia "had been discharged because he was a leader of the Union."[16]

In addition to the foregoing, the inference that Respondent had knowledge of Garcia's role in the campaign, and acted thereon in terminating Garcia, is enforced, rather than allayed, by Respondent's assigned justification. Thus, the discharge can only be explained by Garcia's refusal to serve as a supervisor. For uncontradicted evidence establishes that Garcia rejected the offer, while clearly expressing his will to accept transfer to the second shift.

Ultimate analysis precludes my own abstract substitution for management's judgment. Yet this limitation does not require blind acceptance of the inherently implausible. And where the reasons advanced for a termination lack rational foundation, pretext is frequently indicated. In other words if truth is to prevail, management's assigned cause is not to be exempted from the evaluation process. In this instance, Respondent's discharge of Garcia hardly resolved any problem concerning a lack of supervision.[17] Indeed it created a new one, for another employee had to be trained to replace him.[18] But above all it is totally incomprehensible that Garcia, whom Respondent described as the employee most capable for advancement to the position of supervisor, would be discharged solely because he preferred to remain outside management.

In sum Respondent's explanation that, suddenly on April 23, it became essential that Garcia make an immediate choice between acceptance of a supervisory position and discharge was viewed as a sham to mask what in reality was a desire to eliminate Garcia, himself, or at least his influence on the organization campaign. In this instance, the false reason for the discharge offered by Respondent contributes to the conclusion that the true motive was unlawful, particularly since "the surrounding facts tend to reinforce that inference."[19] Accordingly, consistent with the testimony of David Perez, I find that Respondent violated Section 8(a)(3) and (1) of the Act by on April 23, 1981, discharging Rafael Garcia to rid itself of the principal employee organizer.

3. The discharge of Jorge Hernandez

Hernandez, after almost 3 years of employment with Respondent, was terminated on May 1, 1981. His discharge was triggered by events of April 30 and May 1, 1981, concerning directions by a supervisor on successive days that he clean presses. On behalf of Respondent it is claimed that an insubordinate outburst by Hernandez on May 1 in connection with his protestations in that regard was the sole cause of his discharge.

Prior to Hernandez' termination, it appears that his union activity was limited to his execution of an authorization card.

With respect to the particulars leading up to his termination, it appears that, on April 30, Supervisor Arriaga instructed Hernandez to clean a press machine. Hernandez felt that this assignment was unfair as he had not operated a press that day. Instead of doing as told, Hernandez went to the office of Assistant Plant Manager Oppenheimer where he protested the assignment. Oppenheimer explained that the press that day had been operated by a supervisor, who had responsibilities to perform other than cleaning the press. He indicated that Hernandez, though not having operated a press that day, was a pressman and earned the pressman's rate. Hernandez was further informed that the duties of that classification included cleaning of the presses. After this meeting Hernandez did as told and cleaned the press.[20]

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[14] Neither Snyder nor Bill Torres contradicted any of the above testimony of Garcia.

[15] Such knowledge was denied by Respondent's witnesses Oppenheimer, Plant Superintendent Bill Torres, and Snyder. Their denials were not believed. Particular concern arose from the testimony of Bill Torres. He related that, on April 22 or 23, he, in conjunction with hearing about union activity, heard rumors about a female employee being "sort of molested." He indicates he received said report from Plant Foreman Nunez on the same day that Israel Torres was terminated but that he directed Nunez to address these matters to plant manager. Though Bill Torres was with Snyder that afternoon when promotion was first offered to Garcia, Bill Torres testified that he had no opportunity to discuss the matter with Snyder on April 22. Torres also admits that on a later date he received an authorization card originating with an employee and informant, which he photocopied and delivered to Snyder. In any event, in resolving the knowledge issued against Respondent, I did not believe and do not rely on Israel Torres' testimony that a list of union supporters existed at the time of his termination on April 22.

[16] Torres denied having made such a statement. Nonetheless, I believed Perez, who was actively employed by Respondent at the time of the hearing. Respondent's challenge to his credibility was unconvincing.

[17] Oppenheimer confirmed that the lack of supervision, which Respondent would have me believe was so critical as to impel termination of Garcia, was not thereafter corrected. Thus, according to his testimony, as of the date of the hearing, in February 1982, the night shift was supervised by the very same individuals that performed in the capacity in April 1981 when Respondent discharged Garcia.

[18] Because of the discharge of Garcia, Juan Roque, an employee with only 2 months' tenure, had to be trained to perform the shipping duties in question. It appears that this was accomplished through temporary assignment of a day-shift supervisor, action which contributed to a further burdening of Respondent's supervisory staff.

[19] See *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966).

[20] Although Otto Oppenheimer has been previously discredited, the above is based on his account which struck as more likely than that afforded by Hernandez, who did not impress as a reliable witness. The latter's version seemed incomplete and carefully guarded to facilitate presentation of his cause in the most favorable light. His uncorroborated testimony as to what transpired on April 30 and May 1 is rejected.

On May 1, Arriaga, toward the close of the shift, again instructed Hernandez to clean a machine that he had not worked, an instruction which led Hernandez to suspect that he was being pressured. Bill Torres happened upon Hernandez who appeared visibly upset. Torres inquired as to the problem, and Hernandez, according to Torres, first referred to his supervisor with a vulgarity, and then expressed his distaste for Arriaga's instruction. He told Torres that he had spoken to Oppenheimer the day before advising that he did not want to clean a press if he were not the operator. Torres claims to have attempted to calm Hernandez down, and then proceeded to arrange a further meeting with Oppenheimer.[21] At the meeting, which was attended by Hernandez, Arriaga, and Oppenheimer, Bill Torres explained that a supervisor had operated the press, and that the latter was required to attend a meeting to plan the work for the second shift.[22] Hernandez was informed that it was of greater priority for the supervisor to participate in those planning sessions than to be cleaning a press. Torres went on to observe that situations have arisen in the past with some frequency whereby a press operator has had to leave, and another pressman is directed to clean that particular machine. Hernandez, still upset, responded that he had seen a supervisor clean a press and that he did not feel that because someone was a supervisor that the latter could not "dirty his hands and clean a press." Finally, Hernandez, in a disgusted and angry state, announced, "[Y]ou can sit here and talk all day if you want but I will not." He rose, stating, "I'll go out and clean the press today but I know I'll be asked to clean it again . . . next week, and I'll be darned if I'll clean it." At this point, Hernandez walked out,[23] slamming the door, thus, himself causing the session to come to conclusion. With this outbreak, Oppenheimer claims to have decided to discharge Hernandez.[24]

With respect to Hernandez, there is no basis for inferring that Respondent was mindful that he had signed a union card, and I have discredited his testimony that he was discharged by Oppenheimer only after opining that a union was needed and would be designated. Accordingly, the critical element of knowledge is lacking in his case. Furthermore, the existence of legitimate cause is aided by the fact that Hernandez had previously been counseled as to his temperament and he was told at that time that management did not wish to view "his job [as] in jeopardy" because of his inability to control his "bad temper."[25] Thus, his termination was founded on considerations which were not inherently suspect, and the General Counsel has failed to establish that the reasons assigned were pretextual.[26] Accordingly, I shall dismiss the allegations in the complaint that Respondent terminated Hernandez in violation of Section 8(a)(3) and (1) of the Act.

[21] The above is based on the credited testimony of Bill Torres. Here again I preferred the testimony of a previously discredited witness over Hernandez. The description of Torres as to the circumstances under which the meeting with Oppenheimer was arranged struck as more likely than the pressured encounter described by Hernandez.

[22] I credit the testimony of Bill Torres that it was Arriaga, and not he, that brought Hernandez to Oppenheimer's office.

[23] I did not believe the testimony of Hernandez that he before leaving opined: "[W]e are going to get rid of the abuse with a union movement and we're going to have a union."

[24] The foregoing is based on a composite of the credited testimony of Oppenheimer and Bill Torres.

[25] See Resp. Exh. 1.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act by terminating Rafael Garcia on April 23, 1981, in reprisal for his union activity.
4. Respondent did not violate Section 8(a)(3) or (1) of the Act by terminating Supervisor Israel Torres and employee Jorge Hernandez.
5. The unfair labor practice set forth above in paragraph 3 is an unfair labor practice having an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom.

Having found that Respondent discriminatorily discharged Rafael Garcia on April 23, 1981, it shall be recommended that Respondent be ordered to provide him immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position and to make him whole for earnings lost from the date of his discharge to the date of a bona fide offer of reinstatement, less net interim earnings. Said backpay is to be computed on a quarterly basis as prescribed by *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[27] It shall be further recommended that Respondent be directed to expunge from its records any reference to the discharge of Rafael Garcia on April 23, 1981, and to provide said discriminatee with written

[26] The General Counsel argues that Hernandez was a victim of disparate treatment in that another employee William Cruz Rivera refused to clean a machine operated by a lead worker in 1979 and was given only a 1-week suspension. It is noted in this connection, however, that the General Counsel misconceives the basis for the discharge of Hernandez. Thus, Hernandez was not discharged because he refused to clean a machine but because of his insubordination in the course of protesting such an assignment. In any event, the record in this case attests to the fact that different discipline meted out on the heels of what appears to be the same infraction is not always indicative of improper motive. Inferences might be carelessly drawn on what appears to be disparate treatment but which very often entails imperfect comparisons and a faulty assumption that different supervisors or even perhaps the same supervisor reacts the same way in terms of the measure of discipline applied to the same offense. The concept also fails to recognize that discipline will differ based on diverse employment histories of the offending enployees. The fallacy is illustrated herein by the handling of Cruz and Hernandez. Hernandez, himself, in January 1980, had refused to clean a press on instructions from his supervisor. Although it appears that Hernandez was counseled in that connection, no formal reprimand was issued, nor was he given time off. From this, those who adhere slavishly to the concept of disparate treatment would, perforce, conclude that because Cruz received a 1-week suspension, while Hernandez received no discipline, Respondent's action against Cruz must have been founded on untoward motivation.

[27] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

notice of said expunction and to inform him that said termination will not be used as a basis for any further adverse personnel action.[28]

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following reconmended:

ORDER[29]

The Respondent, John R. Harland Company of Puerto Rico, Inc., Hato Rey, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging employees from engaging in union activity by discharging them, or in any other manner discriminating with respect to their wages, hours, or terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Rafael Garcia immediate reinstatement to his former position or, if not available, to a substantially equivalent position, without loss of seniority or other benefits, and make him whole for any loss of earnings by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(c) Expunge from its files any reference to the discharge of Rafael Garcia on April 23, 1981, and notify him in writing that this has been done and that evidence of this discharge will not be used as a basis for future personnel actions against him.

(d) Post at its place of business in the city of Gurabo, Commonwealth of Puerto Rico, bilingual copies of the attached notice marked "Appendix."[30] Copies of said notices, on forms provided by the Regional Director for Region 24, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discourage employees from engaging in activities on behalf of Union de Trabajadores de la Industria Gastronomica, Local 610, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, or any other labor organization by discharging, or any other manner discriminating against, employees with respect to wages, hours, or terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

Rafael Garcia having declined reinstatement, WE WILL make him whole for lost earnings he sustained by reason of our discrimination against him, with interest.

WE WILL expunge from our files any reference to the April 23, 1981, discharge of Rafael Garcia and notify him in writing that we have done so, and that neither this discharge, nor any element of it, shall be used as a basis for future personnel action against him.

JOHN R. HARLAND COMANY OF PUERTO RICO, INC.

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[28] See, e.g., *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

[29] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[30] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."